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No. 84-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

vs.

JOHN F. KING, Commissioner of Revenue,
State of Tennessee,
Appellee.

On Appeal From The Supreme Court of Tennessee

MOTION TO DISMISS OR AFFIRM

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COUNTER-STATEMENT of the QUESTION PRESENTED

Whether a business and occupation tax measured by gross receipts is properly apportioned when it only includes gross receipts from sales made through the taxpayer's offices in Tennessee to Tennessee customers?

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COMES NOW the Appellee, John K. King, Commissioner of Revenue, State of Tennessee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, and respectfully moves that this Court dismiss the appeal, or, in the alternative, affirm the judgment below, on the grounds that it does not present a substantial federal question, the decision of the state court is in accord with applicable decisions of this Court, and there are no special or important reasons warranting briefs on the merits and oral arguments.

OPINION BELOW

The opinion of the Supreme Court of Tennessee, filed September 10, 1984, is reported at 678 S.W.2d 19 (Tenn. 1984) and is reproduced in the Appendix to the Jurisdictional Statement, pp. A-1 to A-33.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional and statutory provisions involved contained in the Jurisdictional Statement is adequate.

STATEMENT OF THE CASE

Dissatisfied with Appellant's statement of the case, the Appellee offers the following counter-statement:

During the years in question, Westinghouse Electric Corporation, a Pennsylvania corporation, did business in Tennessee through marketing offices and manufacturing facilities. Westinghouse had a marketing team in its Chattanooga and Knoxville offices which solicited business from the Tennessee Valley Authority (TVA).

In 1968, 1970 and 1971, bids by Westinghouse for the Watts Bar and Sequoyah Nuclear Plants of TVA were submitted by the Chattanooga offices of Westinghouse to TVA's offices in Chattanooga. Westinghouse's bids were accepted by TVA and under these contracts Westinghouse was required to design, fabricate, furnish and sell the nuclear steam supply systems for the two plants and the turbo-generators for these plants.

Westinghouse was required pursuant to its contracts to work with TVA to provide a nuclear power system which was current in design and in accord with nuclear regulatory standards.

The performance of the contracts extended over a period of ten to twelve years. Because of technological developments and

changes in requirements by TVA, there were several hundred change orders in the contracts. These change orders were handled through Westinghouse's Chattanooga office. Westinghouse's Chattanooga office had the sales responsibility for the contracts and coordinated the performance of the contracts with all other Westinghouse divisions. The proceeds from TVA payments were credited to the performance of the Chattanooga office.

Although most of the equipment was installed by TVA, Westinghouse was required to provide technical direction for the installation and start up of equipment. Westinghouse maintained offices at each plant site for its technical personnel and also maintained offices to assist Westinghouse in the timely completion of its responsibilities under the contracts. The purpose of maintaining these offices was to insure that the equipment was installed as designed in order to protect Westinghouse's investment.

Westinghouse also made loans to TVA of special equipment needed for the installation and starting up of the plants. Westinghouse had some of its personnel perform work on changes in the windings of the generators at the plant sites. Westinghouse also hired subcontractors to do some work at the plant sites to change or replace some defective materials.

The equipment was manufactured or purchased by Westinghouse outside Tennessee. Under the contracts TVA was required to make progress payments as Westinghouse built each phase of the custom designed equipment. The contracts provided that title would pass to TVA when a progress payment was made for a piece of equipment or on completion of a phase of equipment. Retainage of 10% was withheld until the units were in commercial operation. According to the contracts, Westinghouse retained the risk of loss until the equipment was delivered to TVA in Tennessee.

Westinghouse did not report the receipts from the sales of this equipment to TVA in its business tax returns in the years in question and in 1977 the Department of Revenue assessed additional business taxes. Westinghouse paid these taxes under protest and brought timely suit for recovery.

Westinghouse claimed at the trial level that it exercised no taxable privilege under the Business Tax Act but that if it did, the Business Tax Act violated the Due Process and Commerce Clauses of the United States Constitution. A statute of limitations question was also raised but is not relevant to the proceedings here. The Trial Court, after hearing the proof, held for the Commissioner of Revenue.

In affirming the Trial Court's ruling, the Tennessee Supreme Court unanimously held that Westinghouse exercised the taxable privilege of doing business in Tennessee as established in the Business Tax Act, T.C.A. §§ 67-4-701 et seq. The Court found Westinghouse's activities in Tennessee were more substantial than the taxpayer contacts in either *General Motors Corp. v. Washington,* 377 U.S. 436 (1964) or *Standard Pressed Steel Co. v. Washington Dept. of Revenue,* 419 U.S. 560 (1975) and these activities provided sufficient nexus to support the imposition of the tax.

The Court also found that the tax was properly apportioned because it was measured by sales proceeds from sales through Westinghouse's Tennessee offices to a Tennessee customer. The Court cited this Court's decision in *Standard Pressed Steel* where it was concluded that the challenged business and occupation privilege tax which was measured by sales to a Washington customer was " 'apportioned exactly to the activities taxed,' all of which are intrastate." 419 U.S. at 564. The Tennessee Supreme Court noted that Westinghouse did not establish that its Tennessee activities were not decisive factors in establishing and holding its Tennessee market.

REASONS FOR DISMISSING THE APPEAL OR, IN THE ALTERNATIVE, AFFIRMING THE JUDGMENT BELOW

Since the decision of the Tennessee Supreme Court is correct and conflicts with no decision of this Court, further review by this Court is not warranted.

The Appellant misinterprets the decision of the Tennessee Supreme Court when it claims that the court's holding is contrary to *ARMCO, Inc. v. Hardesty,* ____ U.S. ____, 81 L.Ed.2d 540 (1984). By reading one sentence out of context the Appellant attempts to manufacture a conflict when none exists. The Appellant challenged the business tax on the basis of whether it was properly apportioned. The Court, relying on prior decisions of this Court, held that the tax was properly apportioned since it applied only to the taxable privilege of doing business in Tennessee. The business tax was measured by sales proceeds from sales through Westinghouse's Tennessee offices to a Tennessee buyer.

This taxable privilege is not taxable in any other state. When a tax is properly apportioned, then by definition there is no risk of multiple taxation. Other states cannot tax the privilege of doing business in Tennessee. Thus, there is no conflict with *ARMCO, Inc. v. Hardesty, supra.*

Westinghouse's argument is predicated on a strained reading of the Business Tax Act, T.C.A. §§ 67-4-701 *et seq.* Westinghouse argues that the business tax is a sales tax and that the decisions of this Court on the constitutionality of privilege taxes are inapplicable because of the nature of the tax. The Tennessee Supreme Court rejected Westinghouse's assertion because Westinghouse lifts one clause from the Business Tax Act and construes it alone without reference to the balance of the statute. Further, Westinghouse ignored the clear legislative intent of the Business Tax Act. The purpose of the Act was to replace the numerous business and occupation taxes with one uniform business tax imposed on the privilege of doing

business. This statement of the legislative intent was made independently of this case in *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn. 1977).

The Tennessee Supreme Court's decision is in accord with the applicable decisions of this Court and there are no special or important réasons warranting briefs on the merits and oral arguments in this matter.

CONCLUSION

This appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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